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No. 85-2005

In The
Supreme Court of the United States
October Term, 1985

LOUISE E. LEWIS and VELMA "SLIM" IVORY,
Appellants,

vs.

CHARLES L. McMASTERS, JIM MEDER, and PAUL KALPAKOFF,
Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE AFFIRM THE ORDER

JAMES D. WEAKLEY
ELDRIDGE, ANDERSON & WEAKLEY
Attorneys for Appellee,
Paul Kalpakoff
5250 North Palm Ave., Suite 202
Fresno, California 93704
(209) 438-7300

COCKLE LAW BRIEF PRINTING CO., (800) 228-8845 (tone) 75
or call collect (402) 342-2831

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Appellee moves the court, pursuant to Rule 16(1)(d) of the rules of this Court, to dismiss the appeal or, alternatively, to affirm the judgment of the United States Court of Appeals for the Ninth Circuit. This request is made on the grounds that appellee, PAUL KALPAKOFF,

acted in such good faith and with probable cause as to not have violated the Fourth Amendment rights of appellants, LOUISE E. LEWIS and VELMA IVORY, and that appellants have requested an incorrect remedy.

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STATEMENT

This is an appeal from a decree of the United States Court of Appeals for the Ninth Circuit, who denied a rehearing to appellants on the motion for summary judgment granted to appellee. The facts underlying the appeal are as follows:

Appellee, PAUL KALPAKOFF, has been a Deputy Sheriff for seventeen (17) years. He has worked for the auto theft division since 1974 and has had training on Vehicle Code Section 2805.

On or about July 26, 1976, PAUL KALPAKOFF received information that there were stolen vehicles at AAA Auto Sales and Dismantling. PAUL KALPAKOFF contacted the California Highway Patrol Automotive Theft Detail, informed them of the possible stolen vehicles, and requested their assistance.

On or about July 27, 1976, PAUL KALPAKOFF and California Highway Patrol Officers Charles L. McMasters, Jim Meder, and Sergeant Dwight Bell went to AAA Auto Sales and Dismantling in order to conduct an investigation and inspection of the wrecking yard. Appellant, LOUISE LEWIS, was informed of the intent of the California Highway Patrol Officers to inspect her wrecking yard

pursuant to Vehicle Code Section 2805. LOUISE LEWIS telephoned her attorney who informed her the California Highway Patrol Officers had the right to inspect her premises. Appellant, LOUISE LEWIS, then allowed the officers to proceed with their inspection.

California Highway Patrol Officer Jim Meder first spoke with the yard manager, VELMA IVORY. He explained to Officer Meder the procedure of taping together car license plates and identifying the plates with the vehicle identification number, the year, make, and model number of the car to be dismantled. The plates would then be sent to the Department of Motor Vehicles so that they could clear their records of the vehicle.

Upon further inspection of the yard, PAUL KALPAKOFF and the California Highway Patrol Officers found parts of vehicles they believed to be stolen. Initially found were parts of a 1972 green Buick which PAUL KALPAKOFF believed to be from a vehicle recently stolen from Deputy Sheriff Green. Deputy Sheriff Green was notified and requested to appear at the dismantling yard to identify the 1972 green Buick parts. Deputy Sheriff Green arrived and identified parts of his stolen 1972 green Buick by stickers and other distinctive markings.

Another item found in the yard was a Ford Pinto engine. The block number was taken from the engine and checked. The engine belonged to a Ford Pinto stolen in Illinois. Also a vehicle identification plate was found in the dismantling yard. It was identified as belonging to a stolen 1969 Camaro Z28.

In the latter part of the inspection, Officer McMasters approached the door of a Mercury Cougar. Near the car door was a 55 gallon barrel in which Officer McMasters noticed a license plate. It struck him as odd the plate was in this barrel as he recalled MR. IVORY stating that the plates of vehicles being dismantled were sent to the Department of Motor Vehicles. Officer McMasters searched further in the barrel and found more license plates. Officer McMasters checked the license plates with the Department of Motor Vehicles and found most were from vehicles reported stolen.

The decision was then made to seize the 55 gallon barrel. The barrel was taken to the Fresno County Industrial Farm where it could be easily searched, and where there was no chance the contents of the barrel would be lost or destroyed.

Appellee, PAUL KALPAKOFF, and the California Highway Patrol Officers believed there was probable cause to arrest the appellants, LOUISE LEWIS and VELMA IVORY, before the barrel was searched.

Appellants, LOUISE LEWIS and VELMA IVORY, were convicted of receiving stolen articles. This conviction was later overturned, as the testimony of an expert convinced the court the evidence found at AAA Auto Dismantling and Sales had been planted by an unknown person.

On or about July 24, 1979, LOUISE LEWIS and VELMA IVORY filed a Title 42 USC Section 1983 action against PAUL KALPAKOFF and California Highway Patrol Officers McMasters and Meder.

On or about September of 1979, defendant/appellee filed a motion to strike and a motion to dismiss the Title 42 USC Section 1983 action filed against him. The motion was heard by the Honorable A. D. Christensen, a United States Magistrate. The United States Magistrate recommended dismissal of the Title 42 USC Section 1983 action filed against appellee.

On or about January 29, 1980, Judge Crocker of the United States District Court concurred with the United States Magistrate and granted the recommended dismissal.

On or about February 5, 1980, LOUISE LEWIS and VELMA IVORY appealed the dismissal to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the dismissal and remanded the case to the District Court.

On or about November 7, 1983, PAUL KALPAKOFF filed a motion for summary judgment in the United States District Court of the Eastern District. On May 30, 1984, the motion for summary judgment was granted by Judge Robert Coyle.

On or about October 22, 1985, appellants filed an appeal to the granted motion for summary judgment. The motion for summary judgment was affirmed.

On December 23, 1985, appellants filed a motion for rehearing. The United States Court of Appeals for the Ninth Circuit denied appellant's motion for rehearing.

On January 22, 1986, appellants filed a notice of intent to appeal to the Supreme Court of the United States.

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ARGUMENT

Appellants complain, in this case, that a 55 gallon barrel was illegally seized under the guise of Vehicle Code Section 2805, in violation of appellants' Fourth Amendment rights under Title 42 USC Section 1983. In all the courts below the validity or constitutionality of Vehicle Code Section 2805 was not an issue.

The sole basis for review by this Court under the facts presented is that specified in Title 28 USC Section 1254(1), namely a writ of certiorari. Appellant has cited Title 28 USC Section 1254(b) which does not exist. If appellants meant (2), they are still incorrect as none of the courts below have held the state statute, Vehicle Code Section 2805, to be invalid, or in any way repugnant to the United States Constitution.

In the alternative, appellee requests that the Ninth Circuit Court of Appeals' Decision be affirmed as this case presents no substantial question warranting plenary consideration by this Court.

Under *Harlow and Butterfield vs. Fitzgerald*, 457 US 800 (1982), there exists for certain officials a qualified or good faith immunity. Under this qualified immunity, the court held that:

> . . . government officials performing discretionary functions generally are shielded from liability for civil

> damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
>
> *Id,* p. 818.

To state this in another way, the qualified immunity will not apply in a situation where the official should have known that his action would violate a person's constitutional rights and/or if he acts with any form of malicious intent.

Harlow, supra, extended the qualified immunity and good faith defense to high ranking officials in the executive department. However, the immunity also applies to police officers under *Pierson vs. Ray,* 386 US 547 (1967), which holds at page 557:

> . . . that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under Section 1983.

In the case at bar PAUL KALPAKOFF is being sued in a civil action under Title 42 USC Section 1983. The suit resulted from the seizure of a barrel found during a lawful inspection done of AAA Auto Dismantling and Sales pursuant to Vehicle Code Section 2805.

Before the barrel was seized, appellee and the two California Highway Patrol Officers had proof there were stolen vehicles on the premises. The evidence found in the 55 gallon barrel was of a destructible nature. In order to prevent any loss or destruction of the evidence, it was decided the barrel should be moved to another location.

This combination of circumstances gave the officers the reasonable belief they had probable cause to seize the

barrel. The barrel was not taken with any wrongful intent on the part of any of the officers. They felt they were doing their duty, as the circumstances necessitated under Vehicle Code Section 2805.

At the time the barrel was seized, the officers believed they had probable cause under Vehicle Code Section 2805 to seize the barrel without first obtaining a warrant. Under *United States vs. Biswell,* 406 US 311 (1972) there is authority allowing officers, investigating under a statute, to seize evidence of a crime found on the business premises during lawful inspection.

The facts in *Biswell, supra,* parallel this case in that federal agents found and seized several sawed-off rifles during an inspection authorized by statute. The owner sued the federal agents alleging that the seizure violated his Fourth Amendment rights. The case went before the Supreme Court and they held that the seizure of the unlicensed sawed-off rifles did not violate the Fourth Amendment.

Biswell, supra, also points out that heavily regulated businesses are subject to inspection. Each owner of such a business should know they are subject to such inspections. *Biswell, supra,* holds at page 317 that,

> . . . the inspection may proceed without a warrant where specifically authorized by statute. The seizure of respondent's sawed-off rifles was not unreasonable under the Fourth Amendment, and the judgment of the Court of Appeals is reversed, . . .

In the case at bar, appellee and the two accompanying Highway Patrol Officers were inspecting AAA Auto Dismantling and Sales under a valid Vehicle Code Section

2805. During the later part of the inspection, California Highway Patrol Officer McMasters was drawn to a 55 gallon barrel by the sight of a license plate on top of the trash. Officer McMasters recalled he had earlier been informed that VELMA IVORY taped all license plates together, recorded information on them and delivered the plates to the Department of Motor Vehicles. A further search of the barrel revealed other license plates which he checked through the Department of Motor Vehicles, finding most belonged to stolen vehicles.

Under the rational of *Biswell, supra,* it was not unreasonable for PAUL KALPAKOFF and the accompanying Highway Patrol Officers to seize the barrel containing evidence of the crime of automobile theft on the ground that the evidence contained in the barrel could easily have been lost or destroyed. The papers and license plates found in the barrel could have been burned or destroyed by other methods available in the auto wrecking yard. In order to preserve the evidence the officers felt the barrel should be removed to an area where it could not be destroyed.

Under *Harlow, supra,* and *Smiddy vs. Varney,* 665 F.2d 261 (9th Cir. 1981), police officers should not be forced to predict the constitutional interpretation by the courts. *Smiddy* states,

> It is necessary that police officers be immune when they reasonably believe that probable cause existed, even though it is subsequently concluded that it did not, because they "cannot be expected to predict what federal judges frequently have considerable difficulty in deciding and about which they frequently differ among themselves."
>
> *Id,* p. 266.

Harlow, supra, concurs in that the court holds, at page 818,

> If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Under the rationale of these two cases, *Harlow* and *Smiddy, supra,* appellee, PAUL KALPAKOFF, and the two California Highway Patrol Officers proceeded in a manner which they in good faith believed to be lawful. Vehicle Code Section 2805 does not speak of the procedure officers should take when finding evidence of a crime while inspecting pursuant to this section. Also, the issue regarding seizure of evidence of a crime has not previously been raised. The officers could not reasonably be held to know whether the courts would or would not authorize such activity, and we should not expect them to try.

People vs. Woolsey, 90 Cal.3d 934, 1002 (1979) states in pertinent part that the purpose of Section 2805 of the Vehicle Code is ". . . to eliminate trafficking in stolen cars and the illegal interchange of stolen auto parts, . . ." Under Vehicle Code Section 2805 California Highway Patrol Officers were given the authority to enter areas, such as an auto dismantling yard, and inspect and investigate for stolen auto parts. It has been stated in *Biswell, supra,* at page 316,

> If inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to

be preserved, the protections afforded by a warrant would be negligible.

Under the purpose stated in *Woolsey, supra,* and the rationale stated in *Biswell, supra,* it is clear that to have forced appellee, PAUL KALPAKOFF, and the accompanying California Highway Patrol Officers to obtain a warrant would have frustrated the purpose and intent of allowing an inspection of auto dismantling yards under Vehicle Code Section 2805. The officers proceeded with their inspection in a lawful manner. They proceeded with the seizure in a manner they reasonably and in good faith felt was lawful and which did not violate any person's Fourth Amendment rights. To have forced the officers to obtain a warrant might have meant destruction or loss of the contents of the barrel, or other evidence, in the dismantling yard. To require a warrant, would frustrate all purposes and intents of an unannounced inspection, which is to catch those violating the law unaware.

> . . . [t]o recover the plaintiff must clear two hurdles: probable cause must be shown not to have existed; the officers must be shown not to have reasonably believed in good faith that probable cause did exist. *Smiddy, supra,* at page 266.

In the case at bar, the appellants have only pointed out errors of the courts below. They have not shown that appellee, PAUL KALPAKOFF, and the California Highway Patrol Officers lacked a reasonable, good faith belief they were acting in a lawful manner, or that they lacked probable cause to seize the barrel.

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CONCLUSION

For the reasons stated above, appellee moves that this appeal be dismissed and, treating the proceeding as an application for a writ of certiorari, that the writ be denied.

In the alternative, and for the foregoing reasons, appellee respectfully submits that the questions presented by appellants are clearly insubstantial and that the judgment of the court below should be affirmed.

Respectfully submitted,

JAMES D. WEAKLEY
ELDRIDGE, ANDERSON & WEAKLEY
Attorneys for Appellee,
Paul Kalpakoff
5250 North Palm Ave., Suite 202
Fresno, California 93704
(209) 438-7300

APPENDIX

Title 28 USC Section 1254 (1) and (2)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or land of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented: * * *